

FCC MAIL SECTION

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DOCKET
ORIGINAL

FCC 93M-186
31346

DISPATCHED BY

In re Applications of

DAVID A. RINGER

ASF BROADCASTING CORPORATION

WILBURN INDUSTRIES, INC.

KYONG JA MATCHAK

SHELLEE F. DAVIS

WESTERVILLE BROADCASTING COMPANY
LIMITED PARTNERSHIP

OHIO RADIO ASSOCIATES, INC.

For Construction Permit for
an FM Station on Channel 280A,
in Westerville, Ohio

MM DOCKET NO. 93-107 ✓

File No. BPH-911230MA

File No. BPH-911230MB

File No. BPH-911230MC

File No. BPH-911230MF

File No. BPH-911231MA

File No. BPH-911231MB

File No. BPH-911231MC

PREHEARING ORDER

Issued: April 23, 1993 ; Released: April 26, 1993

1. We will hold the Prehearing Conference on August 16, 1993, and the hearing will begin on August 31, 1993.¹ Both will start at 8:30 a.m. and will be held in the Commission's offices in Washington, D.C. The applicants will exchange their direct case exhibits at the August 16th prehearing.

2. Appearances and Publication. On or before May 5, 1993, each applicant must show that they have complied with 47 CFR 1.221(c). See DA-423 released April 15, 1993 at para.26. On or before May 17, 1993, each must demonstrate that they have complied with 47 CFR 73.3594(g)'s publication requirements. See DA-423 supra, para.27.

3. Clarification of Issues. Westerville Broadcasting Company Limited Partnership (WBC) faces an air hazard issue (DA-423, supra. at paras.13 and 19 (Issue 1), para.21). If WBC hasn't resolved that issue before the prehearing conference, they will exchange their air hazard direct case then. This will include both their engineering and nonengineering data as well as all correspondence and documents about their efforts (if any) to obtain FAA clearance.

¹ The Trial Judge has blocked off eight days for hearing: August 31 through September 3, 1993, and September 7 through September 10, 1993. A courtroom has been reserved for those days.

4. The Chief, Audio Services Division has also set down a standard comparative issue for hearing. See DA-423 supra., para.19, issue 2. So, on May 10, 1993, each applicant will serve a standardized integration/diversification statement on each of their opponents, and on the Trial Judge. See DA-423 supra. para 26(b).

5. The Chief has called for comparative coverage. See DA-423, supra., para.17. The parties should consider a joint areas and populations exhibit if only for reasons of economy. For if you can't agree on a joint coverage exhibit, each applicant must not only portray their own proposed areas and population, but each of their opponents as well. That will not only amount to a substantial added expense but could also give rise to evidentiary conflicts. But you are now alerted. If you take the joint exhibit route you will be bound by the agreed-upon showing. At any rate get your approach to comparative coverage ironed out early on.

6. All preliminary coverage engineering will be exchanged on or before June 24, 1993. The final engineering will be exchanged at the prehearing conference.

7. All counsel should be prepared to discuss any questions about clarification of existing issues.

8. Perfecting Amendments. The Chief has called on Ringer, ASF, Davis, and WBC to submit perfecting amendments. See DA 93-423 supra., paras.14, 15, 22 and 23. Such amendments are due on or before May 17, 1993. Any amendments as a matter of right must be filed in compliance with 47 CFR 73.3522(b)(2). All amendments, even those that may be filed as a matter of right, must be accompanied by a Petition for Leave to Amend.²

9. This post-designation amendment period (from April 15, 1993 to May 24, 1993) will be the last chance each applicant will have to firm up their application for hearing. This perfecting time is designed to implement the Commission's post-designation amendment policy; i.e., to give all applicants a fair post-designation chance to firm up their applications, and at the same time secure a stable hearing environment as soon as possible, so we can proceed with the hearing on the necessary and remaining issues.

10. Interlocutory Pleadings. In the interest of uniformity and efficient processing, each applicant should direct their interlocutory requests toward one and only one of their opponents. For example, if Ringer decides to seek enlargement of the issues against both ASF and Wilburn, he

² The applicants are reminded to serve their amendments pursuant to para.25 of the HDO. Moreover, Ringer, ASF, and Davis are reminded that they cannot obtain any comparative advantage from their post-cutoff amendments. See DA 93-423 supra., para. 16. In addition, they will be charged with any comparative deterioration resulting from those amendments. See WTAR Radio-TV Corporation et.al., 48 FCC 2d 1147.

should file separate enlargement requests. The same thing holds true for oppositions, replies, and other interlocutory responses, including discovery notices and motions.

11. Supplements will not be accepted unless requested or authorized. You can supplement an original signature affidavit for a faxed one. But let's keep substantive supplements to a minimum. They can cause timing problems. We'll generate more than enough paper without delaying the proceeding via "Supplements." See In re Filing of Supplemental Pleadings Before the Board, 40 FCC 2d 1026 (1972).

12. Discovery. All discovery must be completed on or before August 3, 1993; Automatic Document Production will take place on May 10, 1993; and any In Camera inspection requests must also be filed on or before May 10, 1993.³ It's no defense to an otherwise legitimate discovery motion for the objecting party to assert that they intend to either file a Petition for Leave to Amend or a Motion for Summary Decision that will moot the discovery requests. Nor should the objecting party seek to defer a response to discovery on that ground.

13. No 47 CFR 1.1315 or 1.323 written interrogatories will be employed, and any depositions of opposing principals will be taken in Westerville, Ohio (unless otherwise agreed upon). Please don't notice a witness for any other location unless your opponent agrees to the change.

14. Since this is a seven-applicant proceeding the probability exists that there will be more than one notice to depose certain principals. So on May 12, 1993, at an agreed upon location a discovery conference will be held. There all applicants who propose taking depositions will get together and set up an agreed upon deposition schedule. They will so coordinate that schedule so that each principal eligible to be deposed will be deposed once. The agreed upon schedule shouldn't interfere with other procedural dates we've established.

15. Settlement. This case could prove long and costly. Because of lawyers' and engineering fees, all seven applicants will lose. At best six of you will have spent substantial amounts of time and money prosecuting this case. So from your client's perspective this upcoming litigation is a mistake, another form of warfare. So avoid it if you can. Engage in settlement dialogue now. Don't wait to argue before the Commission three and a half years from today.

³ Before filing an in camera request, an applicant should consider that he is voluntarily seeking a construction permit in a contested proceeding. Privilege claims hinder and even prevent the search for the whole truth. So you are alerted now. If the Trial Judge cannot make critical public interest findings because of claimed privilege documents, he will be forced to draw adverse inferences against the applicant who has claimed the privilege. Any privilege request must meet the five-step procedure outlined in Patterson Communication Associates, 41 RR 2d 640 (1977) and 41 RR 2d 1027 (1977).

16. To this end a negotiating principal from each applicant along with their attorney (if they're not pro se) are directed to attend a settlement disposition conference on August 3, 1993, at 2:00 p.m.⁴ This conference will be held at an agreed upon location. There the parties should determine whether this case can be settled.

17. On or before August 10, 1993, the applicants should submit a Joint Memorandum to the Trial Judge outlining the results of the August 3rd disposition conference. The memorandum should include, but not necessarily be limited to, answers to the following questions:

(a) Has this case been settled? If so, do the settlement's terms pose any public interest questions?

(b) If the case hasn't been settled, were any offers made at the conference? If so, are they still open? For how long?

(c) If the case has been settled, how soon can the settlement package; i.e., the joint request for approval and related papers, be submitted for approval?

18. Marshalling and Exchanging Exhibits. It will contribute significantly to the disposition of this proceeding for the parties to submit and exchange their direct affirmative cases in writing. See 47 CFR 1.249 (d)(2). This will include the sworn written testimony and the exhibits to be offered in support of their direct cases. Such an exhibit exchange will take place at the August 16, 1993 Prehearing Conference.⁵

19. If any party intends to request that official notice be taken of any materials in the Commission's files, that material should be assembled in written form, given a tentative exhibit number, and exchanged on the date set.

20. Each party will assemble their exhibits in a binder. Each exhibit will bear a number via a tab on each document. Please number the exhibits serially starting with the number 1. Each exhibit will also contain the sponsoring witnesses' affidavit - if such an affidavit is required (see para. 18 supra.) Use a prefix to indicate who is sponsoring the exhibits; e.g. Matchak Ex.1, Davis Ex.1, WBC Ex.1, etc.

21. Evidentiary Admission Session. We will hold an evidentiary admission session on August 20, 1993 at 8:30 a.m. There each applicant (in

⁴ The parties needn't wait until August 3, 1993 to initiate settlement efforts. Nor should the mandatory August 3, 1993 conference be the only effort to settle. Don't be afraid to initiate settlement efforts.

⁵ Before he exchanges his written exhibits, counsel would be wise to go over them and delete all unnecessary adjectives and comparative puffing. Let's save everybody time and money.

docket order) will formally identify and offer the direct case exhibits they exchanged on August 16, 1993. The Trial Judge will rule on any objections to these proffers. Immediately after the admission session is concluded, each party will notify his opponents of those witnesses they need to cross-examine and the exhibits or topics to be covered by that cross-examination.

22. Extensions of Time. The case has been placed on the Trial Judge's docket, and courtroom space has been reserved. So we cannot afford the luxury of procedural slippage. Otherwise, other dockets could suffer. So any requests for extensions of time must be made in writing and must be consent extensions. In addition, any request for extension of more than four working days must be signed by the client. Captive extension requests will not be entertained.

23. The August 31, 1993 through September 10, 1993 hearing dates (See Footnote 1 supra. are firm dates. A thorough but speedy trial is contemplated. The hearing dates will not be extended merely because counsel have agreed to recommend a settlement. Daily hearing sessions will begin at 8:30 a.m. and end at 5:30 p.m. with an hour for lunch.

FEDERAL COMMUNICATIONS COMMISSION


Walter C. Miller
Administrative Law Judge